QUESTION PRESENTED

Whether the Federal Deposit Insurance Corporation may remove a case pending in a state appellate court to the appropriate United States district court under 12 U.S.C. 1819(b)(2)(B) (Supp. III 1991).

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-590

MEYERLAND COMPANY AND WILLIAM MICHAEL ADKINSON, PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 1a-30a) is reported at 960 F.2d 512. The order of the district court (Pet. App. 46a-47a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 78a-79a) was entered on May 13, 1992. The petition for a writ of certiorari was filed on August 11, 1992. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Meyerland Company was the obligor on a $25 million note held by Continental Savings Association. Petitioner William M. Adkinson was the president of Meyerland and guarantor of the debt. The note was also secured by a portion of the Meyerland Plaza Shopping Center. Meyerland made no payments on the note, and in September 1986 Continental posted the property for foreclosure. Meyerland filed suit in state court against Continental, seeking a temporary restraining order and damages for, among other things, usury and fraud. Continental counterclaimed, seeking recovery on the note and the guaranty and damages for fraud and breach of contract. See Pet. App. 2a. After a jury trial, the state trial court awarded Continental damages of approximately $30 million, partially offset by an award of approximately $1.1 million in favor of petitioner Adkinson. *Id.* at 2a, 41a. Petitioners appealed to the state court of appeals. *Id.* at 2a.

2. On September 26, 1988, while the state court appeal was pending, the Federal Home Loan Bank Board declared Continental insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver. On October 26, 1988, FSLIC removed the case to the United States District Court for the Southern District of Texas, acting under 12 U.S.C. 1730(k)(1) as then in effect. See Pet. App. 5a. The district court, however, remanded the case to the state appellate court on April 21, 1989. See *id.* at 2a, 44a-45a.

3. On August 9, 1989, the President signed the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (FIRREA). Section 401 of FIRREA, 103 Stat. 354, abolished FSLIC and automatically su-bstituted the Federal Deposit Insurance Corporation (FDIC) as FSLIC's successor in ongoing litigation. On September 7, 1989, the FDIC again removed this case to federal district court, this time acting under 12 U.S.C. 1819, as amended by FIRREA. Pet. App. 2a. Section 1819(b)(2)(A) provides that, with immaterial exceptions, "all suits of a civil nature at common law or in equity to which the [FDIC], in any capacity, is a party shall be deemed to arise under the laws of the United States." Section 1819(b)(2)(B) provides that the FDIC may, again with immaterial exceptions, "remove any action, suit, or proceeding from a State court to the appropriate United States district court."[1] On September 29, 1989, the district court again remanded the case to the state appellate court, and awarded $2,500 in sanctions against the FDIC for having attempted the removal. Pet. App. 2a, 46a-47a.

4. The FDIC appealed the district court's remand order pursuant to 12 U.S.C. 1819(b)(2)(C) (Supp. III 1991), which varies the normal rule (see 28 U.S.C. 1447(d)) by providing that the FDIC may appeal such orders. A divided panel of the court of appeals

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[1] Section 1819(b)(2)(B) was amended in 1991 to require that any such removal take place "before the end of the 90-day period beginning on the date the action, suit, or proceeding is filed against the [FDIC] or the [FDIC] is substituted as a party." Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 161(d), 105 Stat. 2286.

reversed. Pet. App. 52a-73a. Rehearing en banc was granted, *id.* at 74a-75a, and the full court again held in favor of the FDIC, reversing both the district court's remand order and the award of sanctions. *Id.* at 1a-30a.

The court of appeals first recognized, Pet. App. 3a-7a, that this case involved "jurisdictional and removal provisions giving the FDIC broad power to gain access to federal courts in actions to which it is a party pursuant to FIRREA." *Id.* at 3a. Noting that those provisions had been broadly construed in favor of the FDIC, the court explained that "[a]ccess to federal courts in all actions to which it is a party allows the FDIC to develop and rely on a national and uniform body of law." *Id.* at 4a. In this general context, the court approached the specific issue in this case by considering "the plain language and meaning of FIRREA, the Constitutional authority of Congress to grant this sort of removal jurisdiction, and whether there is any reason to think that Congress could not have intended this result." *Id.* at 7a.

The court agreed with the FDIC, Pet. App. 7a-8a, that Section 1819(b)(2)(B), on its face, allowed removal of this case:

> The statute's plain language is quite plain: Any action in a state court may be removed. This language does not limit removable actions to those that have not yet reached a state trial court judgment, nor does it limit removable actions to those that come to the federal courts from a specific state court (i.e., from state trial, as opposed to appellate, court).

Id. at 8a. The court concluded, *id.* at 9a, that under the statutory language the only significant consideration was whether state appellate proceedings had been fully exhausted when removal was attempted. Moreover, the court concluded that although it had seldom done so, Congress had clear constitutional power to authorize removal of cases on appeal. *Id.* at 10a.

The court found nothing in the history of removal jurisdiction that would require a more restrictive reading of Section 1819 than its language would otherwise indicate. Pet. App. 10a-13a. Indeed, the court found it clear that Congress enacted Section 1819 "precisely so that the FDIC could enjoy federal question jurisdiction" of the broadest sort constitutionally permissible. *Id.* at 13a. In addition, the court reviewed various other procedural advantages granted to the FDIC by FIRREA, and concluded that allowing removal of cases on appeal was consistent with the overall scheme and underlying goals of the statute. Pet. App. 13a-15a.

Finally, the court of appeals considered the procedural aspects of removal from a state appellate court to federal district court. Pet. App. 15a-18a. The court found it unnecessary to consider the propriety of having a federal district court conduct "appellate" review of a state trial court judgment after removal, *id.* at 15a, because it found it sufficient for the district court to "take the state judgment as it finds it, prepare the record as required for appeal, and forward the case to a federal appellate court for review." *Id.* at 15a-16a. In this way, the case would "simply com[e] into the federal system in the same condition in which

it left the state system." *Id.* at 17a. Pointing to the frequently ministerial actions performed by district courts on remand of cases from the courts of appeals, the court found unpersuasive petitioners' argument that reducing the district court's role on removal to "rubber-stamping" the state trial court's judgment would deprive the federal court of a justiciable "case or controversy." *Id.* at 16a.

The court concluded, Pet. App. 17a-18a, by noting that it did not intend to suggest that the FDIC removal provisions effected a wholesale replacement of the general removal statutes, 28 U.S.C. 1441-1451 (1988 & Supp. III 1991). It held only that to the extent the "specific powers or mechanisms" of FIRREA were inconsistent with the general removal statutes, the more specific provisions must be deemed to control. Pet. App. 17a-18a.

Judge DeMoss concurred specially, Pet. App. 18a-20a, on the basis of the 1991 amendment providing that the FDIC must initiate removal under Section 1819(b)(2)(B) within 90 days of the later of the date the action is filed or the date the FDIC is substituted as a party. See note 1, *supra*. Although otherwise inclined to find that the statutory language did not address the issue of removal on appeal, he concluded from the language and structure of the amendment that Congress had considered the issue and intended that where the FDIC was substituted as a party, the fact that the case might be on appeal in the state system should be immaterial to the agency's right to remove it to federal court. Pet. App. 19a-20a.

Five judges dissented. Pet. App. 20a-30a. The dissenters believed that the "broad statutory

language" addressed only the type of cases that could be removed, not their trial or appellate status. *Id.* at 23a. They therefore rejected a statutory construction that would require federal district courts either "to sit as appellate courts over the removed state court cases," which would require them to exercise appellate rather than "original" jurisdiction (see 28 U.S.C. 1441(a)), or "to 'rubber stamp' state court judgments and forward them to federal appellate courts for review," in which case they would not have before them a "case or controversy" of the sort required to support federal jurisdiction under Article III of the Constitution. Pet. App. 24a-25a & n.7. After reviewing, *id.* at 26a-29a, a variety of hypothetical procedural questions that might arise in a case removed after judgment in the state trial court, the dissent concluded, *id.* at 29a-30a, that its jurisdictional and procedural concerns could be satisfied by allowing post-judgment removal to the district court only where that court could properly grant relief from the state court's judgment under Rule 60 of the Federal Rules of Civil Procedure.[2]

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[2] Rule 60(a) allows a district court to correct clerical errors and errors of "oversight or omission" at any time, but only with leave of the appellate court where an appeal has been docketed. Rule 60(b) allows the court to relieve a party from a final judgment for a variety of reasons, including mistake or inadvertence, newly discovered evidence, fraud, reversal of a predicate judgment, other inequity of continued application, or "any other reason justifying relief." Any motion for relief must be made "within a reasonable time" after entry of the judgment from which relief is sought; where the ground is mistake, new evidence or fraud, that time may not exceed one year.

ARGUMENT

1. Petitioners' principal contention (Pet. 7-12, 20-22) is that a case may not be removed to a federal district court while pending in a state appellate court, because the somewhat unusual procedural posture of such a case on removal would vitiate the federal court's jurisdiction. Petitioners argue that a federal district court cannot exercise original jurisdiction once the state trial court's plenary jurisdiction has been cut off by the entry of judgment and the subsequent filing of a state appeal. Pet. 11.[3] Indeed, petitioners maintain that the district court may not take even the procedural steps approved by the court of appeals in this case to "prepare the record as required for appeal, and forward the case to a federal appellate court for review," Pet. App. 15a-16a, because in doing so the district court would have no meaningful opportunity to act on a justiciable "case or controversy." See Pet. 20-22.

It is true that in cases removed under Section 1819(b)(2)(B) it is incumbent upon the federal courts "to deal with the unique problem of a shift in jurisdiction in the middle of a case which arises whenever cases are removed from state to federal court." *Granny Goose Foods, Inc.* v. *Brotherhood of Teamsters, Local No. 70*, 415 U.S. 423, 435 (1974). As the court below found, however, it is straightforward

[3] Petitioners also argue that a federal district court can never exercise "appellate" jurisdiction over a state court judgment. Pet. 11; see also Pet. App. 22a-24a (dissenting opinion). The court of appeals found it unnecessary to consider this argument in light of the post-removal procedure it prescribed. Pet. App. 15a.

to address that problem in this case by heeding this Court's instruction that "[a]fter removal, the federal court 'takes the case up where the State court left it off.' " *Id.* at 436 (quoting *Duncan* v. *Gegan*, 101 U.S. 810, 812 (1880)). That is, all that has occurred in state court will be deemed to have occurred in federal court, 415 U.S. at 435-436; see 28 U.S.C. 1450, so that the case "simply comes into the federal system in the same condition in which it left the state system." Pet. App. 17a. In this case, because initial proceedings in the state trial court had been concluded and an appeal perfected at the time of removal, it was appropriate for the district court to "take the state judgment as it [found] it," *id.* at 15a, and to take only such steps as were necessary to allow the appeal to proceed in the federal system.

The operation of the procedure approved by the court of appeals in this case is illustrated by *5300 Memorial Investors, Ltd.* v. *RTC*, 973 F.2d 1160, 1162-1163 (5th Cir. 1992), and *Walker* v. *FDIC*, 970 F.2d 114 (5th Cir. 1992), in each of which the same court subsequently approved a district court's adoption of a state court judgment after removal. See also *FDIC* v. *Kahlil Zoom-In Markets, Inc.*, No. 92-1339 (5th Cir. Nov. 13, 1992) (no appellate jurisdiction until district court enters a final judgment, but district court may adopt state court's judgment as its own). By entering judgment the district court puts the case, formerly conducted under state court rules, into a proper federal procedural posture. The district court is then in the same position, with the same rights and powers to act (such as by granting relief, if available, under Fed. R. Civ. P. 59 or 60) as it would have been if the

case had originated in federal court. If an adopted state court judgment is incorrect, that can and will be determined by the federal court of appeals on direct review. See *5300 Memorial Investors*, 973 F.2d at 1163-1164 (vacating the judgment adopted by the district court and remanding the case to that court for retrial); *Walker*, 970 F.2d at 124 (reversing and remanding in part state decision adopted by district court).[4]

Petitioners' contention that the role of the district court on removal is too insubstantial to support federal jurisdiction is without merit. We do not understand petitioners to question that FIRREA properly granted the district courts original jurisdiction over any civil suit (with exceptions not material here) to which the FDIC is or becomes a party. See 12 U.S.C. 1819(b)(2)(A) (Supp. III 1991). This case thus came within the district court's subject matter jurisdiction from the time that the FDIC was substituted as a party. Moreover, there is no question that a live controversy existed between the parties at the time of removal, and that a federal court could grant

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[4] As noted below, the cases litigated to date in the courts of appeals have not established wholly uniform (or clearly exclusive) post-removal procedures. We see no reason to believe, however, that the general approach suggested by the court below is unworkable, or that the lower courts will not be able to develop adequate solutions for any problems that arise in particular cases. In any event, because this case was decided on appeal from a remand order, its facts present no actual post-removal question. The court therefore correctly characterized the dissent's concerns as mere "premonitions" that would unnecessarily complicate the consideration and decision of this case. Pet. App. 17a.

effective relief to the prevailing party. Cf. *Church of Scientology* v. *United States*, No. 91-946 (Nov. 16, 1992), slip op. 5-6 (appellate court has jurisdiction where it can order effective relief from district court order, regardless of whether enforcement of order has divested district court itself of jurisdiction).

Under the decision below, to be sure, on removal of this case from the state appellate court it is possible that the district court will initially do no more than adopt the state trial court's decision, prepare the record and forward it to the federal appellate court. See Pet. App. 15a-16a; *Walker*, *supra*. As the court of appeals pointed out, however, Pet. App. 16a, district courts are often required to take equally "mechanical" actions when cases are remanded with instructions to enter a particular judgment, grant or deny an injunction, or take some other action consistent with the decision of the court of appeals. In all such cases the district court's jurisdiction is unquestioned, although its power in exercising that jurisdiction is severely constrained.

Petitioners appear to concede, moreover, Pet. 16-17, that under Section 1819(b)(2) a district court would have jurisdiction to consider and grant a motion for relief from a state court's judgment so long as that motion was proper and timely under the Federal Rules of Civil Procedure—presumably regardless of the availability of such relief under state procedural rules.[5] It is difficult to understand, however, how a

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[5] It is not clear that relief from the state judgment under Rule 60(b) would have been improper in this case. None of the opinions in the court of appeals addressed this issue, although the dissent apparently assumed that such relief was unavail-

district court with the power to reopen or modify a state court judgment, subject only to federal procedural constraints, could lack the power to adopt that judgment for the purpose of positioning it appropriately for federal appellate review.

Petitioners suggest no conflict between the decision below and any decision of this Court or of another court of appeals. Indeed, the decision is consistent with those of other courts of appeals that have considered similar issues. See, *e.g.*, *In re Savers Fed. Savings & Loan Ass'n*, 872 F.2d 963 (11th Cir. 1989) (interpreting similar FSLIC statute to allow post-judgment removals); *In re Resolution Trust Corp.*, 888 F.2d 57 (8th Cir. 1989) (interpreting similar RTC statute to allow removal of case on appeal in state court); *Jackson* v. *American Savings Mortgage Corp.*, 924 F.2d 195 (11th Cir. 1991) (same); *Ward* v. *RTC*, 972 F.2d 196 (8th Cir. 1992) (same).[6] There is accordingly no reason for this Court to grant review.

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able. Petitioners' assertion, Pet. 17 n.8, that all motions under Rule 60(b) are subject to a one-year time limitation is simply inaccurate.

[6] The decisions in the courts of appeals do not reflect complete uniformity with respect to procedure after removal. Compare the decision below (district court may enter state court's decision as its own, predicating federal appeal) with *Jackson* v. *American Savings Mortgage Corp.*, 924 F.2d at 198-199 & nn.9-11 (party seeking appeal should file motion to alter or amend judgment in district court within ten days after removal, see Fed. R. Civ. P. 59(e), with federal appeal lying from grant or denial of that motion) or *Ward* v. *RTC*, *supra* (reviewing denial of motion filed after removal under Fed. R. Civ. P. 60(b)). Differences on post-removal procedure are subsidiary, however, to the central issue of whether post-judgment

2. Petitioners' contention that the court of appeals has created a "wholly independent procedural track" for removals under 12 U.S.C. 1819 (Supp. III 1991), Pet. 12, misapprehends the court's decision. As the court specifically pointed out, Pet. App. 17a-18a, the power to remove a case on appeal in state court does not wholly displace the general removal statutes; it is merely one of several specific provisions relating to the FDIC that supplement and partially supersede the general statutes in the specific circumstances in which they apply. In addition to the right to remove cases on appeal, for example, Congress has provided that the FDIC may remove a case without bond or security; remove a case in which it is (or is substituted as) a plaintiff; remove within 90 (rather than 30) days of commencement of the action, or within 90 days of substitution of the FDIC as a party; and appeal an ordinarily non-appealable order of remand. 12 U.S.C. 1819(b)(2) (Supp. III 1991); see Pet. App. 13a-15a. Indeed, as the court of appeals found, the various procedural advantages conferred on the FDIC with respect to removal clearly indicate "the importance Congress placed on getting cases falling under the scope of FIRREA into federal courts," and are completely consistent with the court's holding that Section 1819 allows removal at any stage before a state judgment becomes final and non-appealable. Pet. App. 15a. Together, these special removal rules "allow the FDIC to step into the shoes of a troubled

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removal is permissible at all. On that issue the lower courts are in agreement. As noted above, this case was decided on appeal from an order of remand, and its facts therefore present no actual post-removal procedural question.

financial institution at any stage of [the] proceedings without being penalized for the timing of that substitution[,] and to effectively and aggressively protect the institution's interests and assets." *Ibid.*

3. Petitioners quarrel with the court of appeals' reading of the statutory language. Pet. 14-17. As this Court has frequently made clear, however, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 112 S. Ct. 1146, 1149 (1992). The decision below gives full scope to the plain language of Section 1819(b)(2)(B), which provides for removal of "*any* action, suit, or proceeding from *a State court* to the appropriate United States district court" (emphasis added). Petitioners, on the other hand, rely on an inconclusive statement in a legislative committee report to argue that "any action, suit, or proceeding" refers only to the types of cases that the FDIC can remove, not to the procedural status of the litigation. Pet. 15-16. Yet the only limitation on the meaning of "any" found in the statutory language is an express exception, inapplicable here, for certain cases in which, among other things, the FDIC was appointed as receiver solely by state authorities. Moreover, as the court of appeals remarked, Pet. App. 8a-9a, the lack of any qualification of the phrase "a State court" implies that it should be read broadly to include any such court. Compare 12 U.S.C. 632 (providing for removal of certain international banking law suits involving federally chartered corporations "at any time before the trial thereof"); see also *In re Savers Fed. Savings*, 872 F.2d at 966.

As noted above, petitioners appear to concede the propriety of removal after judgment under some circumstances, but suggest that removal is prohibited once a state notice of appeal has been filed. Pet. 11. There is simply nothing in the statutory language (or legislative history) to support such a result. Congress's primary concern in enacting the jurisdictional provisions of FIRREA was to ensure that the FDIC would have access to a federal forum in which to litigate cases it inherited upon appointment as a receiver. The key element in this access is the entry of the FDIC into the litigation as a party, placing important federal interests at stake. Congress understood that "[t]he appointment of a conservator or receiver can often change the character of litigation." H.R. Rep. No. 54, 101st Cong., 1st Sess. Pt. I, at 331 (1989). The fact that a case is actually on appeal in state court, rather than pending appeal or still pending judgment in a trial court, does not change the fact that once the FDIC becomes a party, a federal statute vests jurisdiction in the appropriate federal district court. The court of appeals' decision properly interprets the statutory language, and accords fully with the legislative goal of affording federal interests, represented here by the FDIC, the protection of a federal forum. See generally Pet. App. 13a-15a. There is no reason for further review.

4. Finally, petitioners allege broadly, Pet. 22-25, that the decision below violates constitutional principles of full faith and credit, comity, and federalism, as well as the Tenth and Seventh Amendments.[7] Spe-

[7] Petitioners did not raise any of these arguments in their briefs in the court of appeals.

cifically, petitioners object to the reexamination or alteration of the state trial court's judgment by any lower federal court.[8] Petitioners' arguments would, however, impugn any provision for removal from a state trial court after judgment, and therefore have no merit.

As the court of appeals recognized, Pet. App. 10a, it has long been settled that Congress may provide for removal to federal court of cases otherwise within their constitutional jurisdiction, and may authorize such removal "either before or after judgment." *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 349 (1816); see generally C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3721 (1985). Congress having explicitly provided that any case in which the FDIC is a party shall be treated as arising under the laws of the United States, 12 U.S.C. 1819 (b)(2)(A) (Supp. III 1991), and therefore within the original jurisdiction of the federal district courts, 28 U.S.C. 1331,[9] it is within Congress's constitutional power to allow removal of such cases at any stage

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[8] Petitioners also argue that the court of appeals' decision violates principles of finality and res judicata. Such arguments ignore the fact that the state trial court judgment was on appeal and subject to modification or reversal. See Pet. App. 5a-6a; cf. *Ward*, 972 F.2d at 198 (res judicata inapplicable where case removed while on appeal and subsequent state appellate decision void).

[9] Petitioners do not question the propriety of this provision. See Pet. App. 10a-13a (reviewing history of federal question jurisdiction and concluding that Section 1819's grant of jurisdiction is constitutionally permissible); *Pacific R.R. Removal Cases*, 115 U.S. 1 (1885); *American Nat'l Red Cross* v. *S.G.*, 112 S. Ct. 2465, 2475-2476 (1992).

before the ultimate conclusion of the state proceedings. Petitioners' prudential arguments cannot prevail "where, as here, Congress itself has weighed interests of federalism and comity and given the [FDIC] the power to remove cases to the federal courts." *In re Savers Fed. Savings*, 872 F.2d at 966.

Petitioners argue further, Pet. 24-25, that the findings of the state court jury may not be reexamined by a federal court, "otherwise * * * than according to the rules of the common law." U.S. Const. Amend. VII. In 1870, this Court invalidated under the Seventh Amendment a statute providing for post-judgment removal *and automatic retrial* of civil cases tried before a state court jury. *The Justices* v. *Murray*, 76 U.S. (9 Wall.) 274, 276-282. Nothing in Section 1819 or in the decision below suggests, however, that after removal the facts found by the jury in this or any other case would be treated with any less respect than would have been accorded to similar findings had the case originally been tried in federal court. See Fed. R. Civ. P. 59, 60; *Parsons* v. *Bedford*, 28 U.S. (3 Pet.) 433, 448 (1830) (common law recognized grant of new trial by trial or appellate court). There is accordingly no valid Seventh Amendment objection to post-judgment removal under Section 1819.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1992